

SIVIN, MILLER & ROCHE, LLP
20 Vesey Street, Suite 1400
New York, NY 10007
Phone: 212 349-0300
Fax: 212 406-9462

September 23, 2022

Via ECF

Hon. Mae A. D'Agostino
US District Court, Northern District of New York
445 Broadway
Albany, NY 12207

Re: Starmel v. Tompkin, et al.
Case no. 9:20-cv-89 (MAD/DJS)

Your Honor:

The undersigned represents plaintiff in this action, which is scheduled for trial for October 11, 2022. I write to request that the Court allow remote testimony from three incarcerated individuals: 1) Roy Zehr (detained at Oneida County Jail); 2) Julio Jimenez (05-A-2585, incarcerated at Fishkill Correctional Facility); and 3) Adam Phillips (07-A-2145, incarcerated at Sing Sing Correctional Facility). Defense counsel objects to remote testimony from any of these individuals, and further objects to any testimony from Adam Phillips on the ground that he was not listed by plaintiff in response to defendants' interrogatories. For the reasons stated below, plaintiff submits that the Court should exercise its discretion in allowing remote testimony from all three individuals.

All three individuals are in a position to offer testimony that would assist the trier of fact in resolving a central issue in this case, i.e., whether defendants used excessive force against plaintiff on February 24, 2017. It is anticipated that Mr. Zehr will testify to overhearing statements made by defendant Sgt. Terry James to plaintiff in which he threatened plaintiff and essentially acknowledged having used excessive force against plaintiff. (Mr. Zehr subsequently furnished an affidavit to that effect). Messrs. Jimenez and Phillips were present during the February 24, 2017 incident, and it is anticipated that their testimony will support plaintiff's claims of use of excessive force.

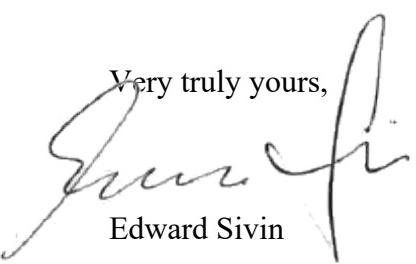
Plaintiff seeks to present the testimony of these three witnesses remotely for two reasons: First, each of these witnesses has indicated some reluctance to testify. The prospect of remote testimony may ease their reluctance, and would also avoid the additional time, expense, and effort of having them transported to and from the trial. Second, depending on what evidence is adduced at trial, plaintiff may decide not to call all three of these witnesses. In that event, it

certainly will have been preferable for those witnesses not to have been physically transported from their current locations to the courthouse.

Finally, while we acknowledge that Mr. Phillips was not listed by plaintiff in response to defendants' interrogatories, his identity comes as no surprise to defendants. In DOCCS paperwork that was exchanged by defendants during pre-trial discovery, Phillips was listed as a "potential witness" at the Tier 3 hearing that was held in connection with February 24, 2017 incident. Enclosed is a copy of the document in question.

Thank you for your attention to this matter.

Very truly yours,



Edward Sivin

Cc: All parties (via ECF)

NEW YORK STATE - DEPARTMENT OF CORRECTIONAL SERVICES
CLINTON CORRECTIONAL FACILITY

ASSISTANT FORM

TO: Schall, R

FROM: DISCIPLINARY OFFICE

You have been selected to assist inmate Stamel, K. 02A0923, SHU-24 in a pending
Tier 3 for a misbehavior report dated 2-24-17. (DN) (Location)

Pursuant to Section 251.4.2 of Chapter V, your role is to ensure that the inmate understands the charges, interview potential witnesses identified by the inmate, and report the results of your efforts to the inmate. You may also be requested to obtain relevant documentary evidence to assist in the preparation of the inmate's defense to the charges.

TO BE COMPLETED BY ASSISTANT:

I initially met with this inmate on March 2, 17 at 12:45
(Date) (Time)

He has requested the following inmates to be interviewed as potential witnesses:

Between 1-12 Call

J. Windfield
A. Bland
J. Jimenez
Phillips

DIN
07A5399
09A4043
05A2585
07A2145

LOCATION
ODS 10
1
P-6-14-9
12

AGREES TO TESTIFY
Yes No _____
Yes No
Yes No _____
Yes No
Yes No _____
Yes No

He has requested the following other persons to be interviewed as potential witnesses:

Nurse OBS saw him

(Name)

over
Documents from Sergeant T. B. get sent to OBS
use of force UI
To & From
Video & extract Shu-OBS

ACTION TAKEN:

TO BE COMPLETED AT CONCLUSION OF ASSISTANCE

I have interviewed witnesses and assisted as requested and reported the results to the inmate charged.

Assistant's Signature: R. Schall

Date: 3/2/17 Time: 1:25

Inmate's Signature: _____

Date: _____ Time: _____

Inmate Refused to Sign, Witnessed by: S. Brantley